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No. 08-88

IN THE

Supreme Court of the United States

STATE OF VERMONT,
Petitioner,
v.
MICHAEL BRILLON,
Respondent.

On Writ of Certiorari to the Vermont Supreme Court

BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether delays caused by state-funded public defenders can give rise to a Sixth Amendment speedy trial violation.

2. Whether indigent defendants with public defense counsel enjoy broader speedy trial rights than defendants with private counsel.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] As administrators of the States' criminal justice systems, *amici* have a responsibility to ensure that the State is not held accountable for the untimeliness of defense counsel when they are acting behalf of their clients, not the State. Honoring the requirement that only state action can result in constitutional violations preserves a zone of action in which the attorney-client relationship is free from undue interference by federal law. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

The Speedy Trial clause also protects the public interest in prompt and effective administration of criminal justice. *See Barker v. Wingo*, 407 U.S. 514 (1972). This fundamental state responsibility is advanced by legal rules that preclude criminal defendants from using delays of their own counsel to seek dismissal of the charges against them. *Amici* accordingly submit this brief to assist the Court in its resolution of this case.

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[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. The Constitution protects rights only from action taken on behalf of the State. Once a public defender undertakes the representation of a criminal defendant, he acts solely on behalf of his client and adverse to the State. *Polk County v. Dodson*, 434 U.S. 312 (1981). Accordingly, while prosecutorial delay can violate a defendant's Sixth Amendment right to a speedy trial, a public defender's delays cannot, any more than delays by privately retained defense counsel.

In *Polk County*, for example, this Court held that a public defender was acting on behalf of her client—not the State—when she declined to pursue an appeal. The fact that the State funded the public defender was insufficient to render her actions "under color of state law." *Id.* at 318. "Except for the source of payment," the attorney-client relationship is "identical to that existing between any other lawyer and client." *Id.* Thus, the Court held, once a public defender commences representation of a defendant, her assignment is "in no way dependent upon state authority." *Id.*

Like cross-examining the State's witnesses and moving to suppress evidence, moving for a continuance falls within the basic responsibilities of defense counsel, whether public or private. Indeed, as the Court has recognized, delay "may work to the accused's advantage," and is "not an uncommon defense tactic." *Barker v. Wingo*, 407 U.S. 514, 521 (1972). Such an adversarial function cannot be attributed to the State.

This understanding of the defense function long predated the creation of public defender offices. Well

into the 20th century, if defense lawyers were provided for indigents at all, they were members of the private bar, working *pro bono*. Indeed, history indicates that the Framers adopted the right to counsel as the means through which criminal defendants could secure other rights—including the right to a speedy trial. The right to counsel and the right to a speedy trial, like the other protections afforded by the Sixth Amendment, were intended to protect accused persons from prosecutorial abuses that had existed under English common law. Accordingly, the defense asserts the right as a shield against dilatory action by the State.

Because the obligations of public defenders and private defense lawyers to their clients are identical, it follows that the scope of the Sixth Amendment speedy trial right is the same for indigent defendants as it is for defendants who are able to afford counsel. There is no basis for drawing a distinction under the Sixth Amendment. Whether a lawyer is paid by public funds or privately retained, he does not act on behalf of the government and cannot violate his clients' constitutional right to a speedy trial.

2. The court below erroneously held that the Sixth Amendment imposes an obligation on defense counsel to be expeditious, but this is not a constitutional requirement. As this Court has recognized, because effective assistance of counsel is the essential prerequisite for the protection of all of the defendant's rights, effectiveness cannot be sacrificed in the interest of faster trials. By ruling that criminal defendant can assert speedy trial violations for the conduct of their own counsel, the Vermont Supreme Court created an unwarranted constitutional remedy.

First, a post-conviction inquiry into defense counsel's delays would duplicate the inquiry for an ineffective assistance claim. While defense counsel—whether public or private—have a constitutional obligation to be effective, there is no independent basis for scrutinizing counsel's speed. In certain cases of prejudicial delay, the appropriate constitutional remedy is an ineffective assistance claim.

Allowing a second constitutional claim for the conduct of defense counsel would also have perverse results. Because a speedy trial claim does not require an affirmative demonstration of prejudice, it could be based on a lesser showing than an ineffective assistance claim. At the same time, a speedy trial violation provides a more severe remedy—dismissal of the indictment—than a violation of the right to counsel. This result would be an illogical inversion of Sixth Amendment concerns, since this Court has recognized that the right to counsel, as the means to secure other rights, is the most pervasive right.

Moreover, a defendant who receives the benefit of his counsel's delay should not also receive the even greater benefit of dismissal for a speedy trial violation. In *United States v. Loud Hawk*, 474 U.S. 302 (1986), for example, this Court held that a defendant's interlocutory appeal would not be counted towards a violation for this reason. Moving for a continuance is no different; indeed, defense counsel may be constitutionally required to delay if it is necessary to ensure effective assistance. Because the judgment of the court below does not comport with the purpose of either the Sixth Amendment right to a speedy trial or the right to counsel, it should be reversed.

ARGUMENT

I. BECAUSE A PUBLIC DEFENDER DOES NOT ACT ON BEHALF OF THE STATE WHEN PERFORMING TRADITIONAL DEFENSE FUNCTIONS, HE CANNOT VIOLATE HIS CLIENT'S SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL.

The Constitution shields enumerated rights only from state action. Thus, only persons acting on behalf of the State may violate the Sixth Amendment's guarantee that criminal defendants "enjoy the right to a speedy and public trial." U.S. Const. amend. VI. A public defender does not act on behalf of the State: once he undertakes representation of a defendant, he henceforth acts solely on behalf of his client and adverse to the State. Because this duty is the same for both public and private defense counsel, neither can violate their clients' constitutional right to a speedy trial.

This conclusion is squarely supported by *Polk County v. Dodson*, 454 U.S. 312 (1981), in which the Court held that a public defender was not acting on behalf of the State when she declined to pursue her client's appeal on the ground that it was frivolous. *Id.* at 314. Though the public defender was paid by the county, *id.* at 314 n.1, the Court determined that the employment relationship was "insufficient to establish that a public defender acts under color of state law within the meaning of § 1983."[2] *Id.* at 321.

[2] Later cases have confirmed that *Polk County* refers to state action generally, not only §1983's jurisdictional requisite that an official act "under color of state law." *See Georgia v. McCollum*, 505 U.S. 42, 53 & n.9 (1992) (discussing *Polk County* as a

Rather, once a public defender begins her representation of a defendant, her "assignment entail[s] functions and obligations in no way dependent on state authority. . . . Except for the source of payment, [the] relationship [between herself and her client] [becomes] identical to that existing between any other lawyer and client." *Id.* at 318; *see also id.* ("Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.") (citation omitted).

Under the rule of *Polk County*, a public defender's pre-trial delay, rendered under representation to his client, does not implicate the State's authority any more than the delay of a private lawyer. Indeed, "[i]n our system a defense lawyer characteristically opposes the designated representatives of the State." *Polk County*, 454 U.S. at 318. Defense counsel, whether public or private, serve the public interest only in the most general sense, "not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'" *Id.* at 318-19; *see also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 641 (1991) (in the adversary system, "[a]ttorneys for private litigants do not act on behalf of the government . . . attorneys represent their clients"); *Faretta v. California*, 422 U.S. 806, 820 (1975) (defense counsel "shall be an aid to a will-

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state action case); *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."); *Blum v. Yaretsky*, 457 U.S. 991, 1008-09 & n.20 (1982) (extending the reasoning of *Polk County* to state action).

ing defendant—not an organ of the State"). The State, moreover, has a constitutional obligation not to interfere with the professional independence of defense counsel.[3] *Polk County*, 454 U.S. at 321-22.

Moving for a continuance is one of the basic functions of a defense lawyer.[4] *See, e.g.*, *United States v. Lattany*, 982 F.2d 866, 882 (3d Cir. 1992) ("Each time counsel changed, the new attorney appointed to represent [defendant] had to be granted adequate time to prepare the case."). Like "enter[ing] 'not guilty' pleas, mov[ing] to suppress State's evidence, object[ing] to evidence at trial, cross-examin[ing] State's witnesses, and mak[ing closing arguments," *Polk County*, 454 U.S. at 320, it is an adversarial function. Though the court below ruled that the continuances of three of respondent's counsel violated respondent's right to a speedy trial, *see* Pet. App. 25-27, it is "peculiarly difficult to detect any color of state law in such [an] activit[y]." *Polk County*, 454 U.S. at 320.

Nor does history support the contention that the public defender is a state actor. *Cf. Towers v. Glover*, 467 U.S. 914, 921 (1984) ("No immunity for public defenders . . . existed at common law [when the Civil Rights Act was enacted] because there was, of course, no such office or position in existence at that

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[3] All defense lawyers, whether public or private, operate under standards of competence and professional responsibility that require the exercise of independent judgment. *See* ABA Model Rules of Professional Conduct 5.4 (2004); ABA Standards for Criminal Justice: Professional Independence 5-1.3 (3d ed. 1993).

[4] As the Court has repeatedly recognized, delay is often advantageous to the defendant. *See Barker*, 407 U.S. at 521; discussion *infra* pages 16-17.

time."). Until well into the 20th century, most court-appointed defense counsel were private attorneys working *pro bono*. The very concept of a "public defender," paid with public funds, is a relatively recent development: this Court did not mandate the appointment of defense counsel for indigent persons until 1963.[5] *Gideon v. Wainwright*, 372 U.S. 335 (1963); *see also Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending *Gideon* to misdemeanor cases).

Moreover, the Framers could not have been concerned about the danger of delays occasioned by defense counsel. The speedy trial right, which has roots in the Assize of Clarendon, Magna Carta, and the Habeas Corpus Act of 1679, was intended to remedy the "major evils" of "undue and oppressive incarceration" prior to trial and the "anxiety and concern accompanying public accusation." *United States v. Marion*, 404 U.S. 307, 315 n.6, 320 (1971); *see also Klopfer v. North Carolina*, 386 U.S. 213, 222-26 (1967). But at English common law prior to the adoption of the Bill of Rights, the right was asserted only against the Crown, not least because defendants had no right to counsel.[6] *See Powell v. Alabama*, 287

[5] In 1947, for example, only 20 percent of indigent persons charged with felony-level offenses were assisted by public or voluntary defender organizations. *See* Ellery E. Cuff, *Public Defender System: The Los Angeles Story*, 45 Minn. L. Rev. 715, 722 (1961) (quoting Fellman, The Defendant's Rights 125 (1958)). And while 45 States had laws requiring the appointment of counsel for indigents in felony cases by the time *Gideon* was decided, only a handful of States required appointed counsel for indigents in less serious criminal cases. *See* Comment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 Creighton L. Rev. 103, 104-106 & n.13 (1970).

[6] In late-seventeenth and early-eighteenth-century England, counsel was viewed as an impediment to efficient prosecution.

U.S. 45, 60 (1932); *see generally* Francis H. Heller, The Sixth Amendment to the Constitution of the United States (1951).

History demonstrates that both the right to counsel and the right to speedy trial, like the other protections afforded by the Sixth Amendment, were intended to address abuses of government power against citizens accused of crimes. Consequently, the defense wields the right to a speedy trial as a shield against dilatory conduct by the State; the very reason that the right to counsel "is essential" is "because they are the means through which the other rights of [the defendant] are secured." *United States v. Cronic*, 466 U.S. 648, 653 (1984). This understanding of the defense function long predated the creation of public defender offices following *Gideon*.

To be sure, *Polk County* does not hold that the adversarial posture of a public defender precludes him from being considered a state actor under all circumstances. This Court has instructed that "the determination whether a public defender is a state actor depends on the nature and context of the function he is performing." *Georgia v. McCollum*, 505 U.S. 42, 54 (1992). Outside of the professional relationship with his client, for example, a public defender is subject to constitutional strictures when making personnel decisions. *See Branti v. Finkel*, 445 U.S. 507 (1980); *see also Polk County*, 454 U.S. at 325 ("It may be . . . that a public defender also would act under color of state law while performing certain administrative and possibly investigative functions.").

James J. Tomkovicz, The Right to the Assistance of Counsel 4 (2002). The Sixth Amendment right to counsel was a response by the Colonies to the lack of the right at English common law. *See Powell*, 287 U.S. at 60-65.

Within his capacity as legal counsel, the Court has held that a public defender commits a constitutional violation when he fails to fulfill government's constitutional obligation to provide effective counsel, *see, e.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984), and when he discriminatorily exercises the power conferred to him by government to choose a jury, "a quintessential governmental body." *McCollum*, 505 U.S. at 54; *Edmonson*, 500 U.S. at 624-26.

By contrast, a public defender's untimely performance does not implicate any duty imposed by government. Unlike the constitutional obligation to provide effective assistance, for example, public defenders do not have an absolute obligation to expedite trials, particularly since delay is often advantageous for their clients. And unlike the exercise of a peremptory challenge, delays by defense counsel neither bear on a governmental entity nor "invoke[ ] the formal authority of the court." *Edmonson*, 500 U.S. at 624. As the Court observed in *Barker*, "[a] defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process." 407 U.S. at 527; *Strunk v. United States*, 412 U.S. 434, 439 n.2 (1973) (it is "the prosecutor's obligation to see to it that the case is brought on for trial"). Like the defendant himself, a defense lawyer is under no constitutional duty to expedite the criminal process.

If, as *Polk County* instructs, delays by public and private defense counsel are not imputed to the State, it follows that the scope of the Sixth Amendment speedy trial right is the same for indigent defendants as it is for defendants who can afford counsel. This principle is undoubtedly correct: *Gideon* established the equality of the right to counsel, not a substantive

advantage for indigent defendants. "A rule which would apply one *fourteenth amendment* test to assigned counsel and another to retained counsel would produce the anomaly that the nonindigent, who must retain an attorney if he can afford one, would be entitled to less protection." *Cuyler v. Sullivan*, 446 U.S. 335, 345 n.9 (1980) (internal quotations omitted). Accordingly, the Court has declined to "draw[ ] a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers." *Id.* at 344-45; *see also Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) ("[The] primary office performed by appointed counsel parallels the office of privately retained counsel."). It should decline to do so here.

II. THE COURT BELOW ERRED BY CREATING AN UNWARRANTED CONSTITUTIONAL REMEDY FOR THE CONDUCT OF DEFENSE COUNSEL.

Like the parties, *amici* have a strong interest in the effective and efficient provision of legal services. But the court below erred when it sought to address the problem of public defender funding through a novel application of the speedy trial right. *See* Pet. App. 5. The court concluded that a defendant "cannot be forced to choose between . . . a speedy trial and . . . effective counsel," *id.* at 29, but only the latter right imposes a constitutional obligation on defense counsel. Because of the primacy of the right to counsel, *see Cronic*, 466 U.S. at 655-56, this Court has made clear only that defense counsel must be effective, but not necessarily fast; the State may not sacrifice effective assistance to enable speedier tri-

als.[7] *See Argersinger*, 407 U.S. at 25; *Powell*, 287 U.S. at 45. Yet holding that delays by a public defender may count toward a speedy trial violation would subject both his effectiveness and speed to federal court scrutiny on independent constitutional grounds. This is unwarranted.

First, a post-conviction inquiry into the delays of defense counsel would duplicate the inquiry for an ineffective assistance claim. Every criminal defendant represented by a public defender has a right to the effective assistance of counsel, *see Strickland*, 466 U.S. at 686, at any "critical" stage of the proceedings after an indictment issues.[8] *See United States v. Wade*, 388 U.S. 218, 224 (1967). For example, courts must already decide whether the denial of continuances, or counsel's failure to request them, vi-

[7] In *Argersinger*, for example, the Court mandated counsel for every criminal case in which a defendant's liberty is at stake, thereby inevitably slowing the disposition of petty-offense cases. *See* 407 U.S. at 33-37. Though the Court noted the burden of an already crowded calendar on judges, in which "[a]n inevitable consequence of volume that large is the almost total preoccupation with the movement of cases," it held that dispatch could not come at the cost of fairness. *Id.* at 34-35; *see also Powell*, 287 U.S. at 56-58.

[8] To the extent that delays by public defenders are the result of inadequate funding, ineffective assistance claims may also be a mechanism for addressing this problem. Several public defender offices have refused to take on new clients or petitioned their States for funding on this basis. *See Florida v. Loveridge* (*In re* Reassignment and Consolidation of Public Defender's Motions to Appoint Other Counsel in Unappointed Noncapital Felony Cases), No. 08-1 (Fla. Cir. Ct., Sept. 3, 2008), *available at* http://www.pdmiami.com/Order_on_motion_to_appoint_other_counsel.pdf; *see also* Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. Times, Nov. 9, 2008.

olates the right to effective counsel. *See Strickland*, 466 U.S. at 678; *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983); *Unger v. Sarafite*, 376 U.S. 575, 589 (1964).

Where appropriate, the same claim should apply to requests for continuances by defense counsel.[9] In fact, defendants already may bring ineffective assistance claims for counsel's failure to assert their speedy trial rights. *See, e.g.*, *United States v. Carrasco*, 257 F.3d 1045, 1050 (9th Cir. 2001) (reviewing ineffective assistance claim for trial counsel's failure to move to dismiss indictment under the Speedy Trial Act); *Dokes v. Lockhart*, 992 F.2d 833, 838 (8th Cir. 1993) (same for trial counsel's failure to assert defense based on Ark. R. Crim. P. 28.1). And when defense counsel himself causes pre-trial delay that shades into sheer ineffectiveness, the first inquiry is "whether, in light of all the circumstances, [defense counsel's] acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Next, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.* at 692. A showing of prejudice—based on a "reasonable probability that, but for counsel's unprofessional errors, the result of

[9] Although the Due Process clause also protects defendants against prejudicial delay, *see United States v. Lovasco*, 431 U.S. 783 (1977), it cannot be violated by public defenders because they are not state actors. *See Polk County*, 454 U.S. at 315. But a defense lawyer's ineffective assistance, whether he is appointed or retained, is attributable to the State. *See Cuyler*, 446 U.S. at 335 (because a trial is an "action of the State," without "counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself").

the proceeding would have been different," *id.* at 694—is required because the purpose of the right to counsel is to ensure fairness at trial.[10] *See id.* at 691-92.

Scrutinizing counsel's performance in response to a post-conviction claim of ineffective assistance is a delicate inquiry. In *Strickland*, this Court cautioned that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." 466 U.S. at 688-89. Some of the dangers identified by the Court in that context, including interference with the "constitutionally protected independence of counsel," *id.* at 689, would be equally manifest by judicial scrutiny of defense motions for continuances. A lawyer is presumed to have competently acted on behalf of his client. *See id.* at 690. While this presumption may be questioned by an ineffective assistance claim, there is no independent constitutional basis for second-guessing defense strategy or parsing the mo-

[10] The Speedy Trial clause, in contrast, is "not primarily intended to prevent prejudice to the defense." *United States v. MacDonald*, 456 U.S. 1, 8 (1982). And "unlike the right to counsel . . . deprivation of the right to speedy trial does not *per se* prejudice the accused's ability to defend himself." *Barker*, 407 U.S. at 521. Although the four-part test articulated by the Court in *Barker* counts prejudice to the defendant as a factor, the Court emphasized that none of the factors, including prejudice, is "either a necessary or sufficient condition" to finding a violation of the right. *Id.* at 533. This point was underscored in *Moore v. Arizona*, 414 U.S. 25 (1973) (per curiam) and *United States v. Doggett*, 505 U.S. 647 (1992), in which the Court rejected the proposition that a showing of actual prejudice was essential to finding a violation of the speedy trial right.

tivations of a defendant and his counsel on the ground that defense counsel created unreasonable delay.

Recognizing speedy trial claims based on defense delay would produce other costs. Where, as here, a defendant has successive lawyers whose cumulative continuances may be invoked in support of a speedy trial claim, a court may be tasked with separately weighing the reasons for each lawyer's delay requests—an analysis the court below did not undertake.[11] Yet "[t]he availability of intrusive post-trial inquiry" into delays by defense counsel—like the availability of post-trial inquiry into the effectiveness of counsel generally—may also "encourage the proliferation" of claims. *Id.* at 690.

Moreover, allowing a second constitutional remedy for the untimeliness of defense counsel would result in a more extreme remedy for a far less foundational concern than counsel's effectiveness. Dismissal of an indictment, an "unsatisfactorily severe remedy," is "the only possible remedy" for a speedy trial violation. *Barker*, 407 U.S. at 522; *see also Strunk*, 412 U.S. at 439-40. In contrast, a successful ineffective assistance claim typically results in vacation of the conviction and the opportunity for the State to conduct a new trial. *See United States v. Morrison*, 449 U.S. 361, 365 (1981).

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[11] For example, the court below counted the continuances by respondent's final lawyer toward the speedy trial violation even though the record shows that she used the time to assert respondent's rights in numerous motions, including a motion to dismiss for lack of speedy trial, and ultimately brought the case to trial. *See* Pet. App. 23-24; Pet. Br. 22-23.

At the same time, because a speedy trial violation may be established without an affirmative showing of prejudice to the defendant, *see, e.g.*, *United States v. Doggett*, 505 U.S. 647 (1992), counting defense counsel's delays toward a violation would require a lesser evidentiary showing than an ineffective assistance claim. This inversion of Sixth Amendment concerns runs contrary to the Court's recognition that "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *Cronic*, 466 U.S. at 654 (1984) (internal quotation marks omitted).

As a practical matter, there would be no meaningful restriction of the speedy trial right if delays by defense counsel were to count against the State, since defense counsel are presumed to act in their clients' interest and "[d]elay is not an uncommon defense tactic." *Barker*, 407 U.S. at 521. Indeed, "[w]ithin the limits of professional propriety, causing delay and sowing confusion not only are [defense counsel's] right but may be his duty." *Walters v. National Assoc. of Radiation Survivors*, 473 U.S. 305, 325 (1985) (quoting Henry Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975)).

Recognizing that delay is often in the defendant's interest, the Court has indicated under narrower circumstances that when the defense causes delay, it will not be counted toward a speedy trial violation. In *United States v. Loud Hawk*, the Court held that the 29 month delay resulting from a defendant's interlocutory appeal before trial would not count for this purpose—notwithstanding the defendant's repeated motions for dismissal on speedy trial grounds.

474 U.S. 302, 309 (1986). The Court reasoned that "[a] defendant who resorts to an interlocutory appeal normally should not be able upon return to the district court to reap the reward of dismissal for failure to receive a speedy trial." *Id.* at 316. The same reasoning applies when the defense moves for a continuance. Not only is it in the defendant's interest to have his counsel be as effective as possible, counsel is constitutionally required to delay if necessary to ensure effective assistance. A criminal defendant should not be able to reap the benefits of greater preparation as well as the remedy of dismissal for failure to receive a speedy trial.

As the Court has emphasized, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system." *Strickland*, 466 U.S. at 689. Nor is the goal of the Speedy Trial clause to maximize the efficiency of public defender offices, though of course that is also an important goal, best addressed through the political branches. Notably, many States and the federal government have adopted exacting speedy-trial standards.[12] Several

[12] *See, e.g.*, Cal. Penal Code §1381 *et seq.*; Ga. Code Ann. §17-7-170 *et seq.*; Idaho Code Ann. §19-3501; 725 Ill. Comp. Stat. Ann. 5/103-5; Kan. Stat. Ann. §22-3402; Ky. Rev. Stat. §500.110; La. Code Crim. Proc. Ann. art. 701; Md. Code Ann. §6-103; Mich. Comp. Laws §780.131 *et seq.*; Miss. Code Ann. §99-17-1; N.C. Gen. Stat. §7A-49.4; N.Y. Crim. Proc. Law §30.30; Ohio Rev. Code Ann. §2945.71 *et seq.*; Tenn. Code Ann. §40-38-105; W. Va. Code Ann. §62-3-1 *et seq.*; Wis. Stat. Ann. §971.10; Alaska R. Crim. P. 45; Ark. R. Crim. P. 28.1; Colo. R. Crim. P. 48; Fla. R. Crim. P. 3.191; Ind. R. Crim. P. 4; Iowa R. Crim. P. 2.33; Mass. R. Crim. P. 36; Minn. R. Crim. P. 11.10;

expressly stipulate that the time limits are tolled by defense delay,[13] thereby indicating that these States do not consider such delay as violating defendants' rights. The Court should not adopt a constitutional rule to the contrary.

N.M. R. Crim. P. 5-604(B)-(D); Wash. Court Crim. R. 3.3; Speedy Trial Act, 18 U.S.C. §3161 *et seq*. (federal government).

[13] *See, e.g.*, Cal. Penal Code §1381 (excluding defense continuances); 725 Ill. Comp. Stat. Ann. 5/103-5(f) (excluding "[d]elay occasioned by the defendant"); N.Y. Crim. Proc. Law §30.30(4)(b)-(f) (excluding continuances requested by defendant or his counsel and periods "during which the defendant is without counsel through no fault of the court"); Alaska R. Crim. P. 45(d) (defense continuances); Ark. R. Crim. P. 28.3 (same); Colo. R. Crim. P. 48(b)(3) (extending time 6 months from the date of the grant of defense continuance); Fla. R. Crim. P. 3.191(k) (if defendant or his "counsel is not ready for trial . . . [defendant] is not entitled to be discharged"); Ind. R. Crim. P. 4(A) (excluding defense continuances and delays caused by defendant's acts); *see also* 18 U.S.C. §3161(h)(8)(A) (excluding continuances granted for the "ends of justice").

CONCLUSION

The judgment of the Vermont Supreme Court should be reversed.

Respectfully submitted,

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NOVEMBER 2008